No. 06-331

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SUPREME COURT, U.S.

In The Supreme Court of the United States

LANCE WISE and NANCY WISE,

Petitioners,

v.

WACHOVIA SECURITIES, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Seventh Circuit correctly rejected Petitioners' motion to vacate the arbitration award, which motion was based on Petitioners' contention that the arbitrators were "corrupt" and "guilty of misconduct" as set out by the Federal Arbitration Act, 9 U.S.C. § 10?

CORPORATE DISCLOSURE STATEMENT

The following are either parent corporations of Respondent Wachovia Securities, LLC or own more than 10% of Respondent's stock: Wachovia Securities Financial Holdings, LLC; Wachovia Securities Holdings, LLC; Prudential Securities Group, Inc.; Everen Capital Corporation; Wachovia Corporation; Prudential Capital and Investment Services, Inc.; Pruco, Inc.; and Prudential Financial, Inc.

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Respondent, Wachovia Securities, LLC ("Wachovia"), respectfully requests that this Court deny the petition for a writ of certiorari. In this case, the Seventh Circuit – based on the record presented to the NASD arbitrators and in accord with well-settled law – held that there was a proper basis in the record for the arbitrators to dismiss Petitioners' claims. Contrary to Petitioners' repeated assertions, and as recognized by both the district court and the Seventh Circuit, there was a proper basis for the arbitrators to rule as they did. The holding below is correct and consistent with well-established principles of judicial review of arbitration awards pursuant to the Federal Arbitration Act. It is not necessary for this Court to review that decision. The petition for a writ for certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

This case concerns judicial review of an arbitration award pursuant to 9 U.S.C. § 10 for alleged arbitrator "misconduct." In the arbitration at issue, after considering the exhibits, the parties' briefs, and hearing argument from the parties, the arbitrators dismissed Petitioners' claims against Wachovia. Both the Seventh Circuit and the district court rejected Petitioners' motion to vacate the award.

Petitioners filed the arbitration at issue in August 2002. Petitioners claimed that Wachovia had secondary liability (under theories of respondeat superior or control person liability) for the alleged fraud of Scott Winters, a former Wachovia registered representative, in connection with Petitioners' investment in a private securities offering known as Titan Fund I, L.P. ("Titan Fund"). Documents that *Petitioners* filed with the arbitrators showed that the investments were made *after* Scott Winters had resigned from Wachovia.

After the close of discovery, Wachovia requested that the arbitrators dismiss Petitioners' claims. Wachovia cited two independent grounds upon which dismissal was appropriate. First, based on the undisputed facts, or facts that could not genuinely be in dispute, Petitioners' secondary liability theories could not reach Wachovia. Wachovia briefed controlling law and provided the arbitrators with copies of the cited authorities (*Hauser v. Farrell*, 14 F.3d 1338 (9th Cir. 1994); *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873 (7th Cir. 1992)).

Second, Petitioners were in continuous violation of the arbitrators' discovery order. On the day of oral argument, Petitioners had been in continuous violation of the order for over five months. Petitioners omit any reference to this second ground for dismissal, despite the fact that it was briefed and before the arbitrators, the district court, and the Seventh Circuit.

Contrary to Petitioners' arguments, the record before the arbitrators was not limited to Lance Wise's affidavit and the California Cease and Desist Order directed to Scott Winters and Titan Fund. Rather, the record included the following, which were attached as exhibits to the briefs filed in the arbitration:

- Titan Fund Investment Documents
    - Petitioners' copy of Private Offering Memorandum
    - Petitioners' copy of Limited Partnership Agreement
    - Subscription Agreement signed by Lance Wise

- Investor questionnaire completed by Lance Wise

- Documents Tracing the Funds Invested

  - Lance Wises' Instructions to Wachovia to transfer $135,000 *away* from his Wachovia account (leaving assets worth $253.51 at month's end) *to* a Titan Fund account at the Bank of Marin *after* Scott Winters had resigned

  - Petitioners' copy of Bank of Marin account statement that showed (i) their wire transfers *to* the Titan Fund account *from* Wachovia *after* Scott Winters had resigned and (ii) their wire transfers *to* the Titan Fund account *from* their non-Wachovia accounts *after* Scott Winters had resigned

- Petitioners' Discovery Responses showing that Lance Wise had been a practicing Certified Public Accountant since 1980

- Lance Wise's NASD record showing the NASD licensing exams that Wise himself had passed

Though Petitioners had ample opportunity on brief and during oral argument, they did not challenge the authenticity of these documents. Lance Wise did not dispute that he signed the Subscription Agreement and completed the investor questionnaire. The documents stood unchallenged. Indeed, Petitioners themselves produced, filed, completed or signed all the documents listed above.

The arbitrators entered a written award dismissing Petitioners' claims. Dissatisfied with the award, Petitioners

filed a "Complaint" in the United States District Court for the Northern District of Illinois. Pursuant to 9 U.S.C. § 10, Petitioners requested the district court to vacate the arbitration award on the sole ground that "the arbitrators [were] guilty of misconduct" in dismissing the claims. (Petitioners' Complaint at 6.) Petitioners attached to their "Complaint" the briefs and exhibits filed in the arbitration. The district court found that the arbitration was a "fundamentally fair proceeding" and that Petitioners "were afforded, at the very least, the same opportunity as a court of law would have provided when a summary judgment motion has been filed." (App. at 15a.) The district court denied Petitioners' request to vacate, and Petitioners appealed. The Seventh Circuit affirmed, holding that there was a proper, "common sense" basis for the arbitrators to find that Petitioners knew they were "abandoning Wachovia" when they made the investments at issue. (App. at 9a.)

THERE IS NO COMPELLING REASON SUPPORTING THE EXERCISE OF THIS COURT'S EXTRAORDINARY JURISDICTION

Petitioners ask this Court to address seven separate questions related to the validity of the review of the arbitration award. None of the seven presents any compelling reason for this Court to use its extraordinary certiorari power to review the Seventh Circuit's decision. All seven are based on the same faulty premise. The faulty premise is Petitioners' assertion that the award was "willy nilly . . . without any evidence to support [it]." (Petition at *i.*) In fact, the arbitrators had before them the exhibits filed by the parties, which included Titan Fund investment documents, documents tracing the funds Petitioners claimed they invested, Petitioners' discovery responses, and Lance Wises' NASD record. Additionally, although neither of the

courts below addressed it, the arbitrators also had the fact of Petitioners' long-standing defiance of their discovery order.[1]

The Petition should be denied for three reasons. First, Petitioners did not raise below issues one through three, six and seven. The court of appeals did not address these issues. Thus, Petitioners did not properly preserve these questions for review here. Second, there is no conflict among the Circuits, or among any other courts, with regard to the specific issue that the court of appeals actually decided and that this case presents. Finally, the decision below is correct. The arbitration was not a "star chamber" proceeding, as alleged. (Petition at 10.)

A. Petitioners Did Not Raise Five of the Seven Points in the District Court or Circuit Court of Appeals and May Not Do So Now.

In Petitioners' brief to the Seventh Circuit, they identified the "statement of the issues presented for appeal" as whether, pursuant to 9 U.S.C. § 10, the arbitrators' award was "corrupt" and whether the district court's decision was "proper." (Petitioners' Seventh Circuit Brief at 1.) In Petitioners' district court Complaint, they alleged the arbitrators were "guilty of misconduct," pursuant to 9 U.S.C. § 10, in dismissing their claims. (Petitioners' Complaint at 6-7.)

Only Petitioners' articulation of issues four and five (Petition at *i-ii*) resemble the issues presented below. With regard to these, Petitioners frame the question as whether, pursuant to 9 U.S.C. § 10 and based on the record before it, the arbitrators' dismissal was "corrupt or misconduct" (issue

[1] Although neither court below reached the issue of Petitioners' discovery violation, Wachovia briefed, and did not waive, the issue. Petitioners' discovery violation alone was sufficient cause for the arbitrators to dismiss the claims.

four) or "corrupt and misconduct" (issue five). (*Id.*) Petitioners did not raise any of the other issues in the courts below and cannot do so now.

This Court does not permit parties to raise new arguments in their petitions for certiorari, and Petitioners' attempt to do just that should be rejected. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."). Having not raised them below, Petitioners should not be permitted now to advance issues one through three, six and seven.

B. There Is No Conflict Among the Courts of Appeal, Or Any Other Courts, on the Fourth and Fifth Questions Presented.

The Seventh Circuit's decision rested on a rejection of the single premise of Petitioners' multiple arguments – namely that there was no basis whatsoever for the award. After the Seventh Circuit identified the Federal Arbitration Act's four statutory grounds for setting aside an arbitral award, the court stated that "*if this were really a no-evidence case*, there might be some basis for inferring the presence of one or more of the statutory grounds." (App. at 7a-8a (emphasis added).)

Noting that "arbitrators, like judges and jurors, are allowed to use their common sense and background knowledge," the Seventh Circuit found that the arbitrators had before them a basis upon which to find that, with respect to the investment at issue, that there were no grounds for imposition of liability under respondeat superior or control person theories. (*Id.* at 9a.) The court found a "common sense" basis for the arbitrators to conclude that Petitioners knew that Titan Fund was not a Wachovia offering and that they were dealing with Scott Winters not Wachovia. (*Id.*)

The Petition does not point to a single opinion that conflicts with the Seventh Circuit's holding that arbitrators may use "their common sense and background knowledge to draw inferences from what the evidence shows. And from what it omits." (App. at 9a.) Further, Petitioners fail to accurately or clearly identify the supposed conflict among the circuit courts regarding judicial review of an arbitral award pursuant to the grounds Petitioners advanced below – "corruption" or "misconduct." Petitioners identify the supposed conflict as follows:

> [T]here is a conflict amongst the Circuit court that this Court must resolve, to wit: Are the United States Federal Courts pursuant to 9 U.S.C.A. § 10 rubber stamps in the face of arbitrary and capricious awards based upon no evidence, or violations of public policy that allow a Security dealer (Wachovia) to designate the a [sic] favored arbitrator to render a summary judgment in which the movant presents no evidence to support his decision, assumes no burden to present evidence and demonstrates no undisputed fact issues – the favored arbitrator claims clairvoyance.

(Petition at 14.) Petitioners fail specifically to identify any supposed conflict involved in this matter.

The cases cited in the Petition do not show a conflict among the circuits on the issue before the Seventh Circuit. The authorities cited in the Petition do not conflict with the Seventh Circuit's decision, which again rested on the determination that there was a "common sense" basis for the arbitrators' to dismiss the claims. (App. at 9a.) The judicial proceedings that followed the arbitration turned on the arbitration record – the pleadings and the exhibits filed by

the parties – not on any point of law on which there is a conflict.

C. The Seventh Circuit Correctly Concluded There Was a Proper Basis for the Award.

There were two independent grounds for the arbitrators to dismiss the claims. First, the exhibits established that Petitioners had notice that Titan Fund was a direct, private offering that had nothing to do with Wachovia. Second, Petitioners continuously violated the arbitrators' discovery order over a period of over five months. They were in violation of the order on the day the arbitrators dismissed their claims. They never complied with the order.

The arbitration record included two key categories of exhibits. First, there were the Titan Fund papers. Second, there were the documents that showed the path of the funds Petitioners claimed they invested in Titan Fund. In the arbitration, in the district court, and in the Seventh Circuit, Petitioners did not dispute the authenticity of the documents, which they produced, filed, completed or signed. Nor did they challenge the disclosures about the Titan Fund (*e.g.*, private offering) or the objective facts established by the documents (*e.g.*, source and timing of their transfers of funds, securities licenses held by Lance Wise).

The first page of the Titan Fund Offering Memorandum stated as follows:

> The Interests are being privately offered and sold by the Partnership [defined as Titan Fund I, L.P.] directly on a best efforts basis pursuant to an exemption from the registration provisions of the Securities Act of 1933 . . . .

The Offering Memorandum stated that it was a "Confidential Private Offering Memorandum." It stated that "No secondary market for the Interests exists, and none is likely to develop." Throughout, the Offering Memorandum referred to the Titan Fund partnership and Titan Securities, LLC. Nowhere did it mention Wachovia. Nowhere did it state that Wachovia had anything to do with the offering. At no time did Petitioners' alleged investments in Titan Fund appear on their Wachovia account statements. At no time did Wachovia send Petitioners a confirmation slip regarding their alleged investments in Titan Fund. All other Titan Fund disclosure documents underscored the fact that Titan Fund was a direct, private offering that had nothing to do with Wachovia. The disclosures in the Titan Fund papers were a proper basis for dismissal.

Likewise, the path of the funds Petitioners claimed they invested was a proper basis for dismissal. These documents established that Petitioners transferred funds (i) from Wachovia to a Bank of Marin account for Titan Fund and (ii) from other financial institutions to this same account.[2] As the Seventh Circuit recognized, the arbitrators, "without taking leave of their senses," had a basis to conclude that Petitioners knew they "were indeed leaving Wachovia with Winters." (App. at 9a.)

Based on any one of these grounds – the disclosures in the Titan Fund papers, the path of the funds claimed to be

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[2] Petitioner Lance Wise's contention that he did not "close" his Wachovia account is outside the record he presented to the district court and is misleading. After his transfer of $135,000 from Wachovia, his account was left, at month's end, with assets valued at $253.51. As the Seventh Circuit noted, Wise did not direct the purchase of new investments in his account but transferred funds away from Wachovia; *in effect* he closed his account. (App. at 9a.) By "closing" his account in this way, the arbitrators reasonably could have concluded that Wise abandoned his relationship with Wachovia. (*Id.*)

invested, or Petitioners' violation of the order – the Seventh Circuit's decision, like the district court's ruling and the arbitrators' award, was correct. After more than four years of first arbitration and then litigation, the resolution of this matter should stand final. There is no compelling reason for the Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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